Supreme Court, U.S.
FILED
MAY 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

85-1839

No. 85-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BERRY GALLON,

Petitioner,

v.

LEVIN METALS CORP., a California Corporation, and INDUSTRIAL, IRON AND METAL PROCESSING WORKERS UNION, LOCAL 1088,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Paul Alan Levy
(Counsel of Record)
Alan B. Morrison
Arthur L. Fox II

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioner

May 1986

CASILLAS PRESS INC. - 1717 K STREET NW WASHINGTON DC - 223-1220

QUESTION PRESENTED*

Did the Court of Appeals err by holding that a lawsuit to enforce the duty of fair representation must be served within the six month statute of limitations, and not just filed in court within that time?

* All parties to the proceeding in the court below are listed in the caption.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTE AND RULE INVOLVED 2

STATEMENT 3

REASON FOR GRANTING THE WRIT

The Decision Below Involves an Important Question of Law Which Requires Resolution by This Court, and Directly Conflicts With Decisions of Other Lower Courts 4

CONCLUSION 5

TABLE OF AUTHORITIES

Cases: Page

Continental Baking Co. v. Macon,
No. 85-1400 (petition filed on February 21, 1986) 4

DelCostello v. Teamsters,
462 U.S. 151 (1983) 3

West v. Conrail,
No. 85-1804 (petition filed on May 2, 1986) 4

Statutes:

National Labor Relations Act,
28 U.S.C. §§ 151, *et seq.*

Section 10(b), 29 U.S.C. § 160(b) 2

28 U.S.C. § 1254(1) 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-

BERRY GALLON,

Petitioner,

v.

LEVIN METALS CORP., a California Corporation, and INDUSTRIAL, IRON AND METAL PROCESSING WORKERS UNION, LOCAL 1088,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Berry Gallon petitions the Court to issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the district court is not reported, and is set forth at pages 5a to 7a of the appendix to this petition ("App. 5a-7a"). The court of appeals' opinion is reported at 779 F.2d 1439 and is set forth at App. 1a to 4a.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on January 7, 1986. App. 8a. On March 26, Justice Rehnquist extended the time for filing a petition for the writ of certiorari until May 7, 1986. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), provides:

> (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).

STATEMENT

Petitioner Berry Gallon was discharged in early 1983 by respondent Levin Metals Corporation after ten years of employment in a variety of jobs. He asked respondent Industrial and Metal Processing Workers Union, Local 1088, to process a grievance on his behalf, but it refused to do so. Petitioner did not learn of Local 1088's position in this regard until September 22, 1983. On March 21, 1984, petitioner filed a complaint in state court against both respondents alleging that he had been fired in violation of the collective bargaining agreement between Levin Metals and Local 1088, that his discharge was motivated by racial animus, and that the union had failed to process his grievance for similar reasons. The complaint was not served on Local 1088 until March 28, 1984, and on Levin Metals until April 13, 1984.

The case was removed to the United States District Court for the Northern District of California, which granted respondents' motion for summary judgment and dismissed the complaint as untimely. It first decided that the statute of limitations did not begin to run until September 24, 1983, two days after Gallon learned of the respondents' joint position that he would not be reinstated. Accordingly, the complaint had been filed within the six-month limitations period announced by this Court in *DelCostello v. Teamsters*, 462 U.S. 151 (1983). Nevertheless, the court decided that because section 10(b) of the National Labor Relations Act, from which this Court had borrowed the six-month limitations period, requires service as well as filing within the six-month period, service of a fair representation suit was also required within that time. App. 6a.

The United States Court of Appeals for the Ninth Circuit affirmed. It reasoned that in *DelCostello* this Court had chosen to follow the balance of considerations reflected in section 10(b) in establishing the time for initiating fair representation suits, and although the Court had not specifically mentioned service as well as filing within six months, that was an explicit requirement of section 10(b): "Because the Court in *DelCostello* seem-

ingly adopted section 10(b) *in toto*, we would be remiss were we to eliminate the service requirement." App. 3a.

REASONS FOR GRANTING THE WRIT

This case presents the same issue as two other cases in which certiorari petitions have been filed: namely, whether the requirement in section 10(b) of the National Labor Relations Act that unfair labor practice charges be served on respondents as well as filed with the General Counsel of the National Labor Relations Board within the six-month limitations period, should also apply to require service of complaints in fair representation suits within that same six months. *Continental Baking Co. v. Macon*, No. 85-1400 (petition filed on February 21, 1986); *West v. Conrail*, No. 85-1804 (petition filed on May 2, 1986). If the Court grants certiorari in either of those two cases, this case should be held until the other case is decided, and should then be decided accordingly. If certiorari is granted in this case, it should be consolidated with the other two for argument and disposition. We believe, however, that the issue can be most efficiently litigated and decided by following the first alternative.

CONCLUSION

The petition for certiorari should either be held for disposition consistent with *Continental Baking* or *West*, or should be granted and the case consolidated with the other two cases presenting the same issue.

Respectfully submitted,

Paul Alan Levy
(Counsel of Record)
Alan B. Morrison
Arthur L. Fox II

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioner

May 7, 1986

APPENDIX

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BERRY GALLON,	)No. 85-1769
Plaintiff-Appellant,	)
vs.	)D.C. No. C-84-2425-EFL
	)
LEVIN METALS CORPORATION, et al.,	)
	)
Defendants-Appellees.	)
	)
ROBERT E. HANSTEN,	)No. 85-1814
Plaintiff-Appellant,	)D.C. No. C-84-7132-WHO
vs.	)
	)OPINION
UNITED AIRLINES, Inc., et al.,	)
Defendants-Appellees.	)

Appeals from the United States District Court
Northern District of California
Hon. Eugene F. Lynch, Judge Presiding
Hon. William H. Orrick, Judge Presiding
Argued and Submitted: November 12, 1985
San Francisco, California

Before: WALLACE, ANDERSON, and PREGERSON, Circuit Judges.

PREGERSON, Circuit Judge.

In *DelCostello v. International Brotherhood of Teamsters,* 462 U.S. 151, 155 (1983), the Supreme Court held that the six-

month statute of limitations found in section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), applies to an employee's suit against an employer and a union alleging the employer's breach of a collective bargaining agreement and the union's breach of its duty of fair representation. These two consolidated cases present the question whether the six-month service requirement of section 10(b) similarly applies to such "hybrid" suits. We hold that it does and therefore affirm the district court's grant of summary judgment in favor of the appellees, the unions and the employers.

STANDARD OF REVIEW

We review a grant of summary judgment *de novo* and will affirm if, viewing the evidence in the light most favorable to the party opposing the motion, we find no genuine issue of material fact and determine that the moving party was entitled to judgment as a matter of law. *Poland v. Martin,* 761 F.2d 546, 547 (9th Cir. 1985).

DISCUSSION

The record, viewed in the light most favorable to appellant employees, reveals that although they filed their complaints within the six-month statute of limitations period, no complaint was *served* within the six-month period. The only question before us, therefore, is whether the failure to serve appellees within the six-month period bars the employees' action.

In *DelCostello,* the Court was faced with the lack of a uniform statute of limitations for hybrid actions by an employee. Rather than adopting a state statute of limitations, the Court adopted a provision of the National Labor Relations Act ("NLRA") pertaining to the time for filing an unfair labor practice charge with the National Labor Relations Board. 462 U.S. at 169-72. Section 10(b) of the NLRA provides:

> [N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy

> thereof upon the person against whom such charge is made.

29 U.S.C. § 160(b). The Court felt that this statute provided a closer analogy than state statutes of limitations because of the similarity of "hybrid" suits to unfair labor practice charges and because of the similarity of "considerations relevant to the choice of a limitations period." 462 U.S. at 170-71. The Court stated:

> In § 10(b) of the NLRA, Congress established a limitations period attuned to what it viewed as the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective bargaining system. That is precisely the balance at issue in this case. . . . Accordingly, '[t]he need for uniformity' among procedures followed for similar claims, as well as the clear congressional indication of the proper balance between the interests at stake, counsels the adoption of § 10(b) of the NLRA as the appropriate limitations period for lawsuits such as this.

Id. at 171 (citing *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 70-71 (1981) (Stewart, J. concurring)) (citations omitted).

These considerations seem to counsel the adoption of the six-month service requirement as well. While the Court in *DelCostello* did not specifically address the timing of service in hybrid suits, we note that section 10(b) expressly requires both filing *and* service within a six-month period. *See N.L.R.B. v. Local 264, Laborers International Union*, 529 F.2d 778, 782 (8th Cir. 1976) ("The statute is clear in providing that a charge must not only be filed, it must also be served within the prescribed six month period."), *quoted in Howard v. Lockheed-Georgia Co.*, 742 F.2d 612, 614 (11th Cir. 1984) (per curiam) (holding six month service requirement applies to hybrid actions). Because the Court in *DelCostello* seemingly adopted section 10(b) *in toto*, we would be remiss were we to eliminate the service requirement.

The Eleventh Circuit found these reasons persuasive and has consistently held that in addition to the filing requirement, the six-month service limitation of section 10(b) applies in hybrid cases. *See Williams v. Greyhound Lines, Inc.*, 756 F.2d 818, 820 (11th Cir. 1985); *Dunlap v. Lockheed-Georgia Co.*, 755 F.2d 1543, 1544 (11th Cir. 1985); *Simon v. Kroger Co.*, 743 F.2d 1544, 1546 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 2155 (1985); *Howard v. Lockheed-Georgia Co.*, 742 F.2d at 614. We believe that the uniformity sought by the Court in *DelCostello* would be further served by following the Eleventh Circuit's approach.

Accordingly, a hybrid action alleging breach of a collective bargaining agreement by an employer and a breach of fair representation by a union must be filed and served within six months of the action's accrual. Summary judgment granted appellees in both cases is therefore affirmed.

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BERRY GALLON,	)
	)
Plaintiff,	) No. C-84-2425 EFL
	) SUMMARY JUDGMENT
vs.	)
	)
LEVIN METALS CORPORATION, a California Corporation, IRON & METAL PROCESSING WORKERS UNION, LOCAL 1088,	)
Defendants.	)
	)

This matter is before the Court on the defendants Levin Metals' and Union Local 1088's motion for summary judgment. The first basis for the defendants' motion is that the plaintiff's action is barred by the statute of limitations. In actions alleging breach of a collective bargaining agreement and the duty of fair representation, such as this one, the Supreme Court has held that the applicable statute of limitations is the six month requirement stated under section 10(b) of the National Labor Relations Act. *DelCostello v. International Brotherhood of Teamsters*, 103 S.Ct. 2281 (1983). As required by § 10(b), the plaintiff must file and serve the action within the six month period. 29 U.S.C. § 160(b). *See also Hoffman v. United Markets, Inc.*, 117 LRRM 3229, 3230 (N.D. Cal. 1984); *Howard v. Lockheed-Georgia Co.*, 742 F.2d 612, 613 (11th Cir. 1984) (the holding of *DelCostello* mandates service of process within the limitations period as part of the express statutory provision of § 10(b)).

In order to determine whether this six month statute of limitations bars the plaintiff in this case, it is necessary to determine when the plaintiff's action accrued and when he filed and served his complaint upon the defendants.

A. *When did the plaintiff's cause of action accrue?*

The Supreme Court in *DelCostello* concluded that the plaintiff's cause of action in cases against an employer and a union did not accrue until he exhausted his contractual remedies under the collective bargaining agreement. *DelCostello*, at 2285-86, 2294. *See also Hoffman* at 3230. The collective bargaining agreement in effect at the time of Gallon's "termination" stated that "any appeal in a discharge case must be made in writing within 48 hours after the discharge, or the right of appeal is lost." Mr. Gallon did not file a grievance within this statutory period. Based on this provision, the Court concludes that the plaintiff's cause of action against the union accrued 48 hours after the date of his termination.

For the purposes of this motion, the Court accepts the plaintiff's position that fraud by the defendant employer tolled the statute of limitations from March 4, 1983 (the date Gallon stopped working at Levin Metals) until September 22, 1983. As stated in his complaint, sworn deposition testimony and his grievance form, Mr. Gallon considered himself to be "terminated" as of September 22, 1983. Adding the two days required under the collective bargaining agreement, the six month limitation period mandated under *DelCostello* began to run on September 24, 1983. The plaintiffs' complaint, therefore, had to be filed and served by March 24, 1984.

B. *When did the plaintiff file and serve his complaint?*

It is uncontroverted that the plaintiff failed to serve either defendant before the March 24, 1984 deadline. Where as here, the Supreme Court has adopted completely a statutory scheme that expressly requires both filing and service within the prescribed six month period, the plaintiff's failure to serve the parties bars the action. The Court, therefore, grants the defendants' motion for summary judgment,

IT IS SO ORDERED.

February 8, 1985

EUGENE F. LYNCH
District Court Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BERRY GALLON,	)		
	)		
Plaintiff-Appellant,	)		
vs.	)		
LEVIN METALS	)		
CORPORATION, et al.,	)		
	)		
Defendants-Appellees.	)	85-1769)	
	)No.	85-1814)	
	)		
	)		
ROBERT E. HANSTEN,	)		
	)		
Plaintiff-Appellant,	)DC CV	84-2425	EFL
vs.	)	84-7132	WHO
UNITED AIRLINES, INC., et al.,	)		
Defendants-Appellees.	)		

APPEAL from the United States District Court for the Northern District of California.

THIS CAUSE came to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered January 07, 1986